SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1015

WILLIAM H. EISENLORD, AS ADMINISTRATOR OF THE ESTATE OF MAUDE F. ADDIE, DECEASED,
Petitioner,

vs.

MAY ELLIS, MYRTLE CONLON AND LILLIE SCHUFELDT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BENTLEY M. McMULLIN,
Counsel for Petitioner.

INDEX.

Subject Index.

Table of Cases Cited.

Statute Cited.

Texts Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1015

WILLIAM H. EISENLORD, AS ADMINISTRATOR OF THE ESTATE OF MAUDE F. ADDIE, DECEASED,

Petitioner,

vs.

MAY ELLIS, MYRTLE CONLON AND LILLIE SCHUFELDT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

William H. Eisenlord, as Administrator of the Estate of Maude F. Addie, Deceased, prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Second Circuit entered on February 14, 1942 (R. 162), reaffirming a judgment of the United States District Court for the Northern District of New York entered on May 27, 1941 (R. 126), awarding to the respondents the sum of $4,849.10.

Statement of the Matter Involved.

There is no dispute as to the facts and only questions of law are involved.

Charles E. Addie, of Denver, Colorado, having insured his life for $5,000.00 by four life insurance policies issued by the Mutual Benefit Life Insurance Company of Newark, New Jersey, died at Denver on November 8, 1935. The beneficiary named in the policies was his wife, Maude F. Addie, who thereupon became entitled to the proceeds thereof. About November 20, 1935, she went to the insurance company's Denver agency and made verbal arrangements that the $5,000.00 should remain with the insurance company at interest payable to her during her lifetime, or so long as she had no need for the principal, and that upon her death this amount should be paid to Charles E. Addie's three sisters "it being expressly understood and mentioned to the insurance company that if at any time during her lifetime she had need for the money she would have the right to withdraw it and use it for her living" (R. 97, 102). Pursuant to these verbal instructions she executed, on November 20, 1935, at Denver, a written application or request (R. 118-119) which, omitting those portions not here material, was as follows:

> "The Mutual Benefit Life Insurance Company is hereby requested to retain the proceeds of Death Claim * * * on the life of Charles E. Addie, my husband, and make monthly interest payments thereon * * * to me, if living as the payments respectively fall due. * * * Immediately upon receipt at the company's office in Newark, New Jersey, of due proof of my death, the principal amount * * * shall be payable to May Ellis, Myrtle Conlon and Lillie Schufeldt, my sisters-in-law, share and share alike, or to the survivors or survivor of them, if they or any of them shall be then living, otherwise to my executors, administrators and assigns * * * I am to have the right at any time * * * to withdraw the amount upon which I may then be entitled to receive interest payments. If the right of withdrawal is so exercised,

the liability of the company shall thereupon cease and determine. * * *"

Pursuant to this application and request the company executed on November 30, 1935, and delivered to Mrs. Addie at Denver, an interest bearing certificate of deposit, denominated an interest income certificate (R. 120-121) which, omitting immaterial portions thereof, was as follows:

"It having been agreed that the proceeds of Death Claim * * * Life of Charles E. Addie, shall be retained by the company, the company will pay interest thereon in monthly instalments of $12.58 each, the first instalment being payable December 8, 1935. Such instalments will be payable to Maude F. Addie, wife of the said Charles E. Addie, of Denver, in the City and County of Denver, State of Colorado, provided she shall be living as they respectively fall due. * * * Immediately after receipt at the company's office in Newark, New Jersey, of due proof of the death of Maude F. Addie, the said proceeds, amounting to Five Thousand Thirty-three Dollars and Thirty-three cents, together with any unpaid accretions thereon * * * shall be payable to May Ellis, Myrtle Conlon and Lillie Schufeldt, sisters-in-law of Maude F. Addie, share and share alike, or to the survivors or survivor of them, if they or any of them shall be then living, otherwise to the executors, administrators or assigns of Maude F. Addie * * * Subject to the right of the company to require three months' notice in writing, Maude F. Addie may, at any time, withdraw the amount upon which she may then be entitled to receive interest payments. If the right of withdrawal is so exercised the liability of the company shall thereupon cease and determine. * * *"

During the remainder of Mrs. Addie's lifetime the company paid her the interest due on this certificate and the principal was not withdrawn. Mrs. Addie died in Colorado on September 10, 1940. Adverse claims to the fund were

made both by the petitioner, as administrator of her estate, and by the respondents, as the payees named in the certificate. The insurance company filed an action in interpleader, naming both the petitioner and the respondents as parties thereto, and deposited the $5,033.33, with interest, due under the certificate, with the clerk of the court to abide the outcome of the litigation. The fund less costs now amounts to $4,849.10, and has thus far been awarded to the respondents (R. 126, 181). It still remains on deposit with the clerk of the court under a stay of mandate pending this application for a writ of certiorari.

The petitioner has contended thruout this litigation that the foregoing transaction is a testamentary disposition of property ineffective because not made by a properly executed will. The language of both the application and the certificate follows forms of expression common to wills and, what is more to the point, these documents undertake to accomplish that which is done by a will. That is, they provide for retention of control and power of disposition during life, and for a gift over upon death. Furthermore, there is to be no transfer in any event unless one or more of the sisters-in-law survives Mrs. Addie. All rights under these documents are thus ambulatory; they become fixed and certain only upon Mrs. Addie's death. This ambulatory character is the essential element of a will, and, having the essence thereof, the transaction is, in legal effect, a will. It is conceded that the validity of the transaction is to be determined by the law of the State of Colorado (R. 33, 159) and that there has been no compliance with the statute of wills (R. 95, 118-121).

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on February 14, 1942.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, Sec. 1 (43 Stat. 938), the same being 28 United States Code (1940) Sec. 347 (a).

Opinions Below.

The United States District Court for the Northern District of New York rendered an opinion upon petitioner's motion for a summary judgment (R. 30-37), which opinion is not reported, and did not render an opinion upon the entry of final judgment (R. 126-7). The United States Circuit Court of Appeals for the Second Circuit rendered an opinion upon affirmance of the judgment of the lower court (R. 154), which opinion has not yet been reported. No opinion was rendered upon denial of the petition for rehearing.

The Question Presented.

The question presented is whether the gift to her sisters-in-law of the sum of $5,033.33 made by Maude F. Addie by means of the above-described request and certificate was testamentary in character and ineffective because not made by a validly executed will, in view of the fact that by the terms of the gift the sisters-in-law were to take nothing unless one or more of them survived her and in view of the fact that she reserved the right to withdraw the principal during her lifetime.

Reasons for Granting the Writ.

1. *There are special and important reasons therefor.*

In recent years many attempts have been made, often thru the use of trusts or similar devices, to find some means by which the normal and legal processes of administrating estates of deceased persons could be dispensed with. The present case now discloses that insurance com-

panies, apparently recognizing the profits to be realized from success in the endeavor, have attempted to work out a method by which funds can be left on deposit with such a company subject to full control by the depositor during his lifetime, to be paid over to named beneficiaries upon his death. The object which it is desired to accomplish is to retain the essential ambulatory character of a will, and yet avoid publicity, taxes, the claims of creditors and rights of inheritance. The interest income certificate in question is a recent legal invention which, until the present case, had never been construed by a reported decision. If it is now for the first time held to be valid a long step will have been taken toward abandoning the ordinary processes of administering estates; increasingly large sums will inevitably be concentrated in the hands of insurance companies for secret and extra-legal disposition upon the deaths of their owners. We believe that such a result would be contrary to sound public policy and that any means used to accomplish that result should, in the public interest, be examined with care.

2. *The United States Circuit Court of Appeals for the Second Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.*

A.

If the transaction involved a gift of property effective only upon death it was testamentary and void:

United States Supreme Court.

Basket v. *Hassell,* 107 U. S. 602 (1883).

Colorado.

Taylor v. *Wilder,* 63 Colo. 282, 165 Pac. 766 (1917).
Smith v. *Simmons,* 99 Colo. 227, 61 Pac. (2d) 589 (1936).

New York.

Newman v. *Dore,* 275 N. Y. 371, 9 N. E. (2d) 966 (1937).
McCarthy v. *Pieret,* 281 N. Y. 407, 24 N. E. (2d) 102 (1939).

New Jersey.

Stevenson v. *Earl,* 65 N. J. E. 721, 55 At. 1091 (1903).
Reed v. *Bonner,* 91 N. J. L. 712, 102 At. 383 (1917).
U. S. Trust Co. v. *Giveans,* 97 N. J. L. 265, 117 At. 46 (1922).
Kirkpatrick v. *Kirkpatrick,* 106 N. J. E. 391, 151 At. 48 (1930).
American University v. *Conover,* 115 N. J. L. 468, 180 At. 830 (1935).

Rhode Island.

Sliney v. *Cormier,* 49 R. I. 74, 139 At. 665 (1928).

Miscellaneous.

28 C. J. 624, 628, Gifts, Secs. 11, 43.
68 C. J. 611, 618, Wills, Secs. 234, 238.

B.

In order to avoid the effect of the foregoing decisions, and particularly the Colorado case of *Smith* v. *Simmons, supra,* which the Circuit Court of Appeals conceded would otherwise apply, the Circuit Court said (R. 160): "In the case at bar, however, *the title to the proceeds of the policies passed to the company,* leaving only contractual rights in Mrs. Addie and the sisters." (Italics ours.) No authority is cited for this statement, and we believe none could be. *It is directly contrary to the holding of this court in*

Basket v. *Hassell,* 107 U. S. 602 (1883)

and to

McCarthy v. *Pieret,* 281 N. Y. 407, 24 N. E. (2d) 102 (1939)

Stevenson v. *Earl*, 65 N. J. E. 721, 55 At. 1091 (1903)
Reed v. *Bonner*, 91 N. J. L. 712, 102 At. 383 (1917)
Sliney v. *Cormier*, 49 R. I. 74, 139 At. 665 (1928)

which we believe comprise all of the decisions on the question. In each of these cases a fund, which had been deposited at interest and over which the depositor retained the right to control and withdraw the same during his lifetime, was made payable to a named beneficiary upon the donor's death. Each of these cases held that the transaction was testamentary and void, upon the theory and for the reason that under such circumstances *the fund remained the property of the depositor or donor* and no title thereto passed during the donor's lifetime.

C.

The Circuit Court of Appeals endeavored to uphold the validity of the transaction on the ground that only contractual rights were involved and that a valid third party donee-beneficiary contract was created (R. 158), but in doing so was obliged to *expressly overrule* the only case in which the question had been squarely raised, namely,

McCarthy v. *Pieret*, 281 N. Y. 407, 24 N. E. (2d) 102 (1939).

For further comment, see footnote.*

---

* The holding in the *McCarthy* case is in accord with the general principles of the law of contract. In the present case the sisters-in-law were to receive the fund only if one or more of them survived Mrs. Addie and only if she did not withdraw the fund herself during her lifetime, which right of withdrawal she expressly reserved. The rights of the sisters-in-law were therefore as conditional and uncertain as they would be under a will. Assuming that the transaction was contractual and not testamentary, the contract would be invalid because of this uncertainty (*Williston on*

3. *The United States Circuit Court of Appeals for the Second Circuit has rendered a decision in conflict with an applicable decision of this Court.*

The decision of the Court of Appeals conflicts with *Basket* v. *Hassell*, 107 U. S. 602 (1883).

In that case a fund of $23,514.70 was represented by an interest bearing negotiable certificate of deposit on which the payee, H. M. Chaney, indorsed instructions that it should be paid upon his death to Martin Basket, reserving, however, control of the fund during his lifetime, and delivered the certificate to Basket. This Court, in that case, held that the transaction was testamentary in nature and void. In all essential particulars the facts in *Basket* v. *Hassell* are similar to those involved in the present case.

4. *The United States Circuit Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of other circuit courts of appeals on the same matter.*

Under the theory that the transaction in question gave rise to a valid third party donee-beneficiary contract, which is the theory adopted by the United States Circuit Court of Appeals for the Second Circuit in this case, the decision

---

Contracts (1936 ed.), Secs. 24, 37, 43, 45). The opinion in the *McCarthy* case on this point seems to be based directly on the Williston text. Where title to the fund has been expressly transferred to a trustee, as was the situation in *In re Koss's Estate*, 106 N. J. E. 323, 150 At. 360 (1930), cited in the opinion below, there can be no withdrawal, so that the trustee's promise to pay is not made uncertain because of the reservation of that right. The Circuit Court of Appeals also seems to have overlooked *Townsend* v. *Rackham*, 143 N. Y. 516, 38 N. E. 731 (1894) and *Priester* v. *Hohloch*, 70 App. Div. 256, 75 N. Y. S. 405 (1902).

directly conflicts with the decision of the United States Circuit Court of Appeals for the First Circuit in

Stevens v. *United States*, 89 F. (2d) 151 (C. C. A. 1, 1937)

It appeared in that case that one Thomas McGovern, upon being admitted to the National Home for Disabled Volunteer Soldiers, signed an application for membership which, according to the terms of an Act of Congress, constituted a contract that upon his death without known heirs or legatees the title to his personal property should vest in the home's Board of Managers, subject to reclamation by his heirs or legatees within five years. A certain deposit, with interest accumulations thereon, owned by McGovern at the time of his death, was claimed both by his heirs and by the National Home. The court held that even the Act of Congress could not make the application contractual in nature; that it was testamentary in character and void for want of proper execution as a will; and that McGovern's heirs were entitled to the fund.

Under the theory that the transaction in question was a disposition effective upon death of an interest in property, which is the theory adopted by this Court in

Basket v. *Hassell*, 107 U. S. 602 (1883)

and in the other decisions cited in paragraph 2, B, above, the decision of the Circuit Court of Appeals directly conflicts with decisions of the United States Circuit Court of Appeals for the Ninth Circuit, namely:

Ihihi v. *Kahaulelio*, 263 Fed. 817 (C. C. A. 9, 1920)
Pickens v. *Merriam*, 274 Fed. 1 (C. C. A. 9, 1921).

5. *The United States Circuit Court of Appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.*

We confidently assert that prior to the decision of the United States Circuit Court of Appeals for the Second Circuit in this case no reported decision upheld the validity of a gift, effective only upon death, of a fund over which the donor reserved full control during his lifetime. All of the cases above cited hold that such a transaction is testamentary and void unless executed as a will; and there are other decisions to the same effect to which the limitations of this petition have prevented us from referring. To disregard such complete unanimity of authority would appear to be such an extreme departure from the accepted and usual course of judicial proceedings as to require review by this Court.

Conclusion.

The petition should be granted.

Respectfully submitted,

BENTLEY M. MCMULLIN,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1015

WILLIAM H. EISENLORD, as Administrator of the Estate of Maude F. Addis, Deceased,

Petitioner,

against

MAY ELLIS, MYRTLE CONLON and LILLIE SCHUFELDT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Harry A. Allan,
Attorney for Respondents,
100 State Street, Albany, N. Y.

INDEX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1015

WILLIAM H. EISENLORD, as Administrator of the Estate of Maude F. Addie, Deceased,

Petitioner,

against

MAY ELLIS, MYRTLE CONLON and LILLIE SCHUFELDT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Review by Certiorari of the unanimous decision of the Circuit Court of Appeals, Second Circuit, affirming the District Court, is sought by petitioner herein, in an action involving interpretation of a contract exercising options contained in insurance policies aggregating only $5,000. Peculiar, unusual and novel traits have been ascribed by petitioner to this simple contract, which easily finds it way to legality through the path of numerous, firmly established legal doctrines, abundantly sustained by authorities. Condemnation of insurance in all its beneficial phases is advocated in urging the Court to grant the writ herein.

Respondents claim that the fallacy of petitioner's position lies not in the rules cited, but in the application of these rules.

Statement of the Matter Involved

Petitioner's brief substantially sets forth the material facts except that the provision in all of the insurance policies out of which this action originated, has been omitted. This provision is as follows:

> "At the maturity of this policy, the Company, unless otherwise directed, will extend the above options to the beneficiaries."

Only by reason of conflicting claims to the same fund in the hands of an insurance company by citizens of different states, did a federal Court acquire jurisdiction of this cause through an action in interpleader by the insurance company.

Jurisdiction

The jurisdiction of the Court and the opinions of the Courts below are referred to in petitioner's brief, although the necessity for intervention by the Supreme Court is obscure.

Reasons for Denying the Writ

1. There is no unusual, significant or important reason for granting Certiorari.

Petitioner vaguely discusses publicity, creditor's claims, rights of inheritance, and even the much mooted insurance tax question, in an effort to obtain Certiorari in this case. None of these factors even remotely appear in the record, and delay at every opportunity, as an examination of the record will indicate (Rec. Fol. 186-252), is apparently the chief motive for requesting Certiorari. Petitioner is the

Administrator, but is entitled to no part of the Estate of Maude Addie, and in addition to the funds in this action, respondents are claiming a substantial part of the Estate of Maude Addie in Colorado, by virtue of a separate trust instrument.

No Estate, gift or income tax avoidance device is involved.

Internal Revenue Code, Sec. 811 (c).

Internal Revenue Code, Sec. 22 (b).

Treas Dept. Reg. 103, Sec. 19.22 (b) (1)-1.

Burnet v. *Wells*, 289 U. S. 670.

Helvering v. *Hallock*, 309 U. S. 106.

See *Bailey* v. *U. S.*, 31 Fed. Supp. 778,

which applies the rule in the above cases to life insurance.

An examination of these citations will indicate the taxability of the funds in the transaction at bar, although that question is not presented in this action.

Novelty is ascribed to the contract in an endeavor to sway the Court's discretion to grant the Writ. A provision similar to that hereinabove quoted, was interpreted as mandatory on an insurance company.

Latterman v. *Guardian Life Ins. Co.*, 280 N. Y. 102; 19 N. E. (2d) 978.

A contract similar in *every* legal aspect to that at bar was sustained in

Warren, Executrix v. *United States*, 68 Ct. Cl. 634; Certiorari Denied, 281 U. S. 739,

wherein the Court upheld a contract for the benefit of a third party.

2. There is no important question of local law involved herein, to be resolved by this Court.

A.

Consistent refusal by petitioner to regard the transaction at bar as a contract has led him to cite to the Court numerous cases applying the rule on validity of testamentary dispositions.

Interpretation of written instruments and classification thereof into their proper legal category, is the only question involved herein, and state courts are competent to pass upon this question.

The Court below was well qualified to perform this task, and is amply sustained by authorities.

With the possible exception of *McCarthy* v. *Pierret*, 281 N. Y. 407, the cases cited by petitioner are distinguishable on the facts most of them interpreting either an agency or a unilateral arrangement. The weight to be accorded the McCarthy decision has been considerably lessened by the criticism it has received, and the Court below expressly declined to follow the rule laid down therein, but preferred, in this matter wherein insurance proceeds were involved, to rely on the decision of

In re Koss's Estate, 106 N. J. Eq.

See 53 Harv. Law Rev. 1060; 51 Yale Law Rev. 30.

It is also noteworthy that in the McCarthy decision, Judges Lehman and Loughran, two of the country's most eminent and learned jurists, dissented.

Which horn of the dilemma the Court of Appeals of New York would take in the case at bar—one involving insurance proceeds—in choosing between the Latterman case

(supra) mandatorily requiring the insurance company to permit the exercise of an option, and the McCarthy case, with *Seaver* v. *Ransom* (224 N. Y. 233), in mind would be interesting to watch. Undoubtedly the Court of Appeals would arrive at the same conclusion as the Circuit Court.

3. There is no conflict with the decision in *Basket* v. *Hassell*, 107 U. S. 602.

The Circuit Court apparently either distinguished on its facts, the case of *Basket* v. *Hassell*, cited to it by petitioner, or discarded the rule therein for the more recent, liberal rule of the American Law Institute, Restatement of Contracts (Sections 133, 135).

The distinction in the case of *Basket* v. *Hassell* is obvious, there being no promise therein on the part of the bank to pay the proceeds represented by the certificate to the third party beneficiary. (American Law Institute, Restatement of Contracts, Sections 133, 135.)

This promise, respondents claim, is the fact that distinguishes the present case from those cited by petitioner, and is the *controlling factor* in making the transaction at bar a contract. That there was consideration for this promise is undisputed.

Restatement of Contracts, Sec. 133, Comment (a).

Id. Sec. 135, Comment (a).

Id. Sec. 79, Illustration (1).

Under such a contract the third party beneficiary takes a vested right subject to the reserved power to change or revoke.

Restatement of Contracts, Sec. 142.

In Colorado, this right is always vested and enforcible by the beneficiary.

Hill v. *Capitol Life Ins. Co.*, 91 Colo. 300.

Grimes v. *Barndollar*, 58 Colo. 421.

4. There is no conflict with the decision of any other Circuit Court of Appeals on the *same* matter.

As has been heretofore pointed out, the Circuit Court of Appeals for the Second Circuit in the action at bar, determined that this was a valid contract for the benefit of a third party, and based its decision upon the Restatement of Contracts, which requires assent by a promisor to accede to the request of the promisee to pay the third party beneficiaries. No such fact exists in any of the decisions in other Circuits cited by petitioner.

The Stevens case apparently turned on the question of notice and constitutionality of a Statute failing to provide for such notice. The other cases cited are similarly distinguishable on the facts.

5. No reason exists for the exercise of the power of supervision of the Supreme Court of the United States.

The United States Circuit Court of Appeals for the Second Circuit has followed the usual and expected procedure in its decision in this action.

Approximately one and one-half billion dollars is now held by the various insurance companies doing business in the State of New York under similar supplemental contracts.

New York Insurance Reports, 1940.

Statistical Tables, p. 31.

Certiorari has already been denied by this Court in the only similar case that research has disclosed, probably on the ground that this presented a matter involving only state policy which should be determined by the Courts of the respective states.

Warren, Executrix v. *United States*, 68 Ct. Cl. 634; Certiorari denied, 281 U. S. 739.

Based upon the above decision, untold thousands of Defense Bonds have been issued, naming beneficiaries to take upon the death of the purchaser.

Picture the furore and consider the effect of a reversal of the present decision on such contracts already executed by the Treasury Department in the sale of Defense Bonds on which purchasers have named beneficiaries under the rules established by the Treasury Department. Statutory sanction for the promulgation of such rules is lacking, except that authorization is given for the issuance and transfer of such bonds in such manner and on such terms as the Secretary of the Treasury may prescribe.

See *Liberty Bond Act*, Sec. 6 as amended; U. S. Code Title 31, Sec. 757c, Subsec. (a), as amended.

See *Treasury Department Circular No.* 530 (1936), December 16, 1936, Sec. I, 2(a) (3); Idem, Circular No. 571 (1936), December 16, 1936, Sec. 8.

See also Treasury Department Circular No. 530 (4th Rev., April 15, 1941), Sec. 315.2 (e), and Sec. 315.12.

The Colorado Supreme Court expressly declined to sustain the position sought by petitioner in such a case.

In re Stanley's Estate, 102 Colo. 422; 80 P. 2d 332 (1938).

No reason for Certiorari to the Circuit Court of Appeals for the Second Circuit exists in this case, due to the fact that the Courts of the respective states are sufficiently competent to determine and interpret contracts involving property within, or executed pursuant to, the laws of the respective states.

Conclusion

The petition should be denied.

Respectfully submitted,

HARRY A. ALLAN,
Attorney for Respondents.

Office and Post Office Address, 100 State Street, Albany, New York.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1015

WILLIAM H. EISENLORD, as Administrator of the Estate of Maude F. Addis, Deceased,

Petitioner,

vs.

MAY ELLIS, MYRTLE CONLON and LILLIE SCHUFELDT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

Bentley M. McMullin,
Counsel for Petitioner.

INDEX.

Table of Cases Cited.

Statutes Cited.

Texts Cited.

MISCELLANEOUS.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1015

WILLIAM H. EISENLORD, AS ADMINISTRATOR OF THE ESTATE OF MAUDE F. ADDIE, DECEASED,

Petitioner,

vs.

MAY ELLIS, MYRTLE CONLON AND LILLIE SCHUFELDT.

REPLY BRIEF.

Respondents quote (p. 2)* the following clause from the policies: "At the maturity of this policy, the Company, unless otherwise directed, will extend the above options to the beneficiaries". But the certificate which was issued to Mrs. Addie (R. 120-121) was not authorized by the policies. The settlement options in the policies (R. 116-117) did not provide for payment over of the fund upon death of the beneficiary and expressly limited the beneficiary to the exercise of only one option. The interest income certificate did provide for the payment over of the fund upon the death of the donor and extended to the donor during

* The references (p. 2, etc.) are to the pages of the Brief in Opposition to the Petition for Writ of Certiorari.

her lifetime the right to exercise either of two additional options. The interest income certificate was an entirely new and independent transaction in no way arising out of or connected with the insurance policies, as the Circuit Court of Appeals held (R. 158).

The respondents say (p. 3) that petitioner, as Administrator, "is entitled to no part of the Estate of Maude Addie". The contrary is true; no one but the administrator may lawfully make claim to the fund in question on behalf of her estate.

> 4 Colorado Statutes Annotated, 1935, Ch. 176, Sec. 115, and annotations Respondents cite (p. 3);
> Internal Revenue Code, Estate Tax, Sec. 811 (c);
> *Helvering* v. *Hallock*, 309 U. S. 106 (1940);

which, they say, "will indicate the taxability of the funds in the transaction at bar." If that is true it must be because the transaction at bar is in the nature of a testamentary disposition. The trusts described in the *Hallock* case resemble the transaction now before the court, and, as was said in that case in discussing the earlier decision of *Klein* v. *U. S.*, 283 U. S. 231:

> "The inescapable rationale of this decision, rendered by a unanimous Court, was that the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise." (p. 112.)

This language, as we understand it, means that in deciding whether a transaction is subject to payment of an inheritance tax the substance and not the technical form of the transaction is the determining factor. We contend in the present case that the substance and not the technical form of the transaction should be considered in determining whether or not it is testamentary.

The other authorities cited (p. 3), namely,

Internal Revenue Code, Sec. 22 (b);

Treasury Department Regulations 103, Sec. 19.22 (b)—1;

Burnet v. *Wells*, 289 U. S. 670 (1933);

Bailey v. *U. S.*, 31 Fed. Supp. 778 (1940);

concern taxation of income from the proceeds of life insurance policies invested in accordance with options contained in the policies. Since in this case the fund was not invested in accordance with the options contained in the policies, as hereinabove demonstrated, these additional authorities have no application to the facts of this case.

The Colorado state inheritance tax law does not cover the transaction in question:

Colorado Statutes Annotated, 1935, Ch. 85, Secs. 6-13.

The statement in our petition that tax evasion was one of the purposes which the instrument in question was designed to further has not been answered merely by pointing out that the fund can be taxed if our own theory of the case is correct. If the decision of the Circuit Court of Appeals is not disturbed the interest of the sisters-in-law will not be taxable, because under that decision there is no transfer of property involved.

Latterman v. *Guardian Life Insurance Co.*, 280 N. Y. 102, 19 N. E. (2d) 978 (1939);

cited by respondents (p. 3) concerned the right of infant beneficiaries under a life insurance policy to exercise an option contained in the policy itself. The question primarily at issue was whether estate funds could be so invested. Since there is no exercise of a policy option involved in the present case this decision is inapplicable.

Warren, Executrix, v. *United States*, 68 Court of Claims 634 (1936), cited by respondents (p. 3) was decided by the Court of Claims and argued by the Government in its brief

on petition for certiorari to this Court (denied, 281 U. S. 739) upon the ground that the borrowing powers of the United States enable it to designate the persons to whom upon the death of registered owners the proceeds of its bonds shall be payable, in contravention, if necessary, of the laws of a state. In its brief filed in this Court the Government ignored all question as to the testamentary character of the transaction, considering the Government's powers a sufficient answer to any argument on that point. The case of

In re Stanley's Estate, 102 Colo. 422, 80 P. (2d) 332 (1938),

cited by respondents (p. 7) unhesitatingly recognizes this rule. There can be no question of the power of the United States Government to determine how, and to whom, its own obligations shall be payable. The United States may also determine the persons to whom savings from pension money shall be distributed after the death of a pensioner:

National Home for Disabled Volunteer Soldiers v. *Wood*, 299 U. S. 211 (1936).

In the case of

Stevens v. *United States*, 89 F. (2d) 151 (C. C. A. 1, 1937),

cited in our petition for certiorari at page 10 and referred to by respondents (p. 6), in which it was held that because the transaction was testamentary in character Congress did not have power to legislate with reference to the distribution of the property of a veteran in the National Home for Disabled Volunteer Soldiers, the Circuit Court of Appeals for the First Circuit was thus careful to point out (opinion, p. 152, col. 2) "that this deposit was not the proceeds of a Government pension or any other kind of gratuity from the government, but was his own personal estate", as also stated elsewhere in the opinion. The

fact that no Government funds or moneys or financial obligations were involved in the *Stevens* case readily distinguishes that case from the *Warren* case, and the fact that neither an Act of Congress nor any governmental obligation is here involved distinguishes the case at bar from the *Warren* decision.

Respondents refer (p. 4) to two law review case notes cited by the Circuit Court of Appeals (R. 159), namely,

53 Harvard Law Review, 1060, and

51 Yale Law Journal, 30.

The note in the Harvard Law Review first argues that the *McCarthy* decision was incorrect because the reservation of a life interest does not invalidate a gift, and cites cases so holding; but the present case is not one in which a life interest has been reserved by the donor—it is a case in which the entire interest with full power of disposition has been reserved by the donor and in which the right of the donees is contingent upon one or more of them surviving the donor. The note next argues that the agreement in the *McCarthy* case could have been upheld as being a contract for the benefit of a third party donee beneficiary without, however, considering the effect upon such a contract of the uncertain and conditional provisions which are here involved. Of the three cases cited on this point, two are New York cases which hold that such a transaction as is here involved does not create a valid third party contract:

Priester v. *Hohlock*, 70 App. Div. 256, 75 N. Y. S. 405 (1902);

Townsend v. *Rackham*, 142 N. Y. 516, 38 N. E. 731 (1894).

The third case, *Seaver* v. *Ransom*, will be presently referred to. The note is less persuasive than might have been supposed; certainly its writer did not have in mind the kind of transaction here involved.

The note in the Yale Law Journal criticizes not only *McCarthy* v. *Pieret* but the entire doctrine that the requirements of the statute of wills should be upheld. The authors take the view that if a document is authentic, it should be given effect, and that the intention of donors should be carried out even if what the article calls ritualistic requirements are neglected. We cannot argue whether the requirements of the statute of wills are just or not. We know that the requirements exist, and that the law compels compliance with them. We know, furthermore, that it is not, in general, best to permit testamentary gifts to be made secretly or in such a manner as to defeat the just claims of creditors. We even feel that the rights of legal heirs are entitled to consideration.

In re Koss's Estate, 106 N. J. E. 323, 150 A. 360 (1930), referred to by respondents (p. 4) was a case in which *the fund in question had been transferred to trustees.* The trustees had title to the fund; the entire property in the fund was vested in them. It is because of this that the court said: "It is obvious * * * that there is no specific property to which Gertrude Koss in her lifetime was ever entitled." It was because of this that the rules of contract were held to be applicable; the fund could not be withdrawn by the donor and there was no resulting uncertainty. The court makes this clear, saying: "If it appeared anywhere in the record that Gertrude Koss had a fund which she could compel the transfer of, then the rule of *Stephenson* v. *Earl* would apply." In the present case Mrs. Addie did have a fund which she could compel the transfer of, the rule of *Stephenson* v. *Earl* does apply, and the transaction is testamentary and void.

Seaver v. *Ransom*, 224 N. Y. 233, 120 N. E. 639 (1918), cited by respondents (p. 5) does, it is true, hold that a contract for the benefit of a third party beneficiary is valid and enforceable, but that case does not consider nor decide whether a contract uncertain and contingent in nature and

executed with testamentary intent would be upheld. That point was, however, decided adversely to the claims of the respondents in *Townsend* v. *Rackham, supra,* and in *McCarthy* v. *Pieret,* cited in our petition, page 7.

Basket v. *Hassell,* 107 U. S. 602 (1883), is said (p. 5) not to conflict with the decision in this case because there was "no promise therein on the part of the bank to pay the proceeds represented by the certificate to the third party beneficiary." But the certificate was negotiable and payable to the order of the payee; the payee indorsed the certificate to Martin Basket and delivered it to him; and this indorsement, plus delivery, created a fixed and irrevocable contract right in Basket. Nevertheless the fact that by his indorsement the payee reserved, during his lifetime, control over the fund, rendered the transaction testamentary and invalid because not executed as a will.

Hill v. *Capitol Life Insurance Co.,* 91 Colo. 300, 14 P. (2d) 1006 (1932); *Grimes* v. *Barndollar,* 58 Colo. 421, 148 Pac. 256 (1914), cited by respondents (p. 6) are cases arising under insurance contracts.

We are unable to find any reference in the New York Insurance Reports cited by respondents (p. 6) to transactions of the kind now under consideration, nor would a decision in this case be likely to cause a furor, as respondents believe likely (p. 7), in connection with the issuance of United States bonds, since, as pointed out in our discussion of the *Stevens* case, the Federal Government is not bound to make its obligations payable in conformity with the laws of the States; but if the statements so made by respondents were true, they would only serve to emphasize the importance of the question presented and the necessity for granting the writ of certiorari asked for, since the effect described must already have resulted from the decision of the Circuit Court of Appeals for the First Circuit in the *Stevens* case.

There has been much discussion in this case as to whether

the transaction in question involves contract or property rights. We are unable to see how the rights which are here involved could be contractual. The so-called contract would provide for the payment of the fund only in the event of death and only if one or more of the named donees was then surviving and only if the donor had not, in the meantime, withdrawn the fund. There could be no valid and enforceable right created by an agreement to do such uncertain and contingent things.

Restatement, Contracts, Section 32;
Williston on Contracts (1936 edition), Section 43.

But this is only one answer to the problem. The other answer is that no matter whether the transaction takes the form of a deed, a gift, an agency or a contract, it is still testamentary and effective only if properly executed as a will if its purpose is to do that which only a will can do.

28 Corpus Juris 624, Gifts, Section 11;
28 Corpus Juris 648, Gifts, Section 43;
68 Corpus Juris 611, Wills, Section 234;
68 Corpus Juris 618, Wills, Section 238.

This is true whether the deed, gift, agency or contract is otherwise valid and in due form. Whether the transaction be called a deed, a gift, an agency or a contract, the only question really involved is whether it is in its essential purpose a last will and testament. If so, it is invalid unless there has been compliance with the statute of wills. And in the present case in truth and in fact, in spirit and intent, as well as under the authorities, Mrs. Addie's provision for her sisters-in-law was testamentary in purpose and effect. Not having been executed as a will it cannot be sustained.

Respectfully submitted,

BENTLEY M. MCMULLIN,
Counsel for Petitioner.